OLC 74-0512

26 March 1974

MEMORANDUM FOR: Mr. Warner

SUBJECT : Department of Justice Action on H.R. 12471

I talked with Mr. Robert L. Saloschin, the Department of Justice expert on the Freedom of Information Act and the pending legislation. The Department is very concerned and is moving hard and fast to deal with the legislative disaster now threatened. The Senate Bill S. 2543, according to Saloschin, is much worse than H.R. 12471. The Department's intelligence is that the Senate will go forward with its own bill. The Department is preparing amendments hoping to convert the Senate bill to one which is at least something the government can live with. Mr. Saloschin will be glad to have any suggestions from us. He is quite strong that the situation is almost desperate, that the Hill seems to be insisting that the answer to Watergate is to drastically revise the Freedom of Information Act. The legislation is being rushed, almost on an emergency basis, notwithstanding it is much too complicated and much too important to be treated that way. Both the House and the Senate reports made ludicrous estimates of the cost to the government to implement the legislation and Justice is now asking OMB to attempt some sort of meaningful estimate of cost. Mr. Saloschin urged that if we can get anyone on the Hill to listen, and he asserted several times that the Department has been unable to get anyone to listen, we should indicate that we have not been given the opportunity to present our views and we would very much like to do so. The Department is currently analyzing the legislation, but is having difficulties because new versions appear all the time. In fact, he advises that the newest version of S. 2543 is a Committee print of March 25 which Justice has not yet seen, but Saloschin expects to get a copy this morning.

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Associate General Counsel

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HOUSE PASSES BILL TO STIFFEN FREEDOM OF INFORMATION ACT

House—March 14, by a recorded vote of 383-8, passed HR 12471, to amend the Freedom of Information Act of 1966 to improve public access to government materials and strengthen congressional oversight of the act.

The House overwhelmingly approved this first modification of the Freedom of Information Act over the Justice Department's objections, just as it had unanimously passed the original act in 1966 despite the opposition of the executive branch. *(Vote 54, Weekly Report p. 709)*

Only one minor technical amendment was added on the floor to the Government Operations Committee's proposals for improving the act's machinery for helping citizens to obtain information from federal government agencies.

Background

The Freedom of Information Act (PL 89-487) took effect on July 4, 1967. It required the federal government to make documents, opinions, records, policy statements and staff manuals available to citizens who requested them, unless the materials fell into at least one of nine exempted catagories. Citizens were given the right to bring suit under the act, with the burden of proof falling on the agency that refused to release materials. *(Congress and the Nation Vol. III, p. 490)*

In a Sept. 20, 1972, progress report, the House Government Operations Subcommittee on Foreign Operations and Government Information concluded that the act had been "hindered by five years of footdragging" by the federal bureaucracy. The panel recommended legislative and administrative remedies.

Committee Action

The subcommittee held further hearings in May 1973 on legislative proposals to strengthen the act. The product of their work, HR 12471, was unanimously approved by the full committee on Feb. 21, 1974, and reported March 5 (H Rept 93-876).

The committee's bill, which passed the House with only one minor amendment, contained proposals for amending the act in seven areas:

Indexes

Under the act, agencies were required to "make available for public inspection and copying" an up-to-date index of final opinions on settlement of internal cases, policy statements not published in the *Federal Register* and administrative staff manuals. The bill would add the stipulation that agencies must publish and distribute "by sale or otherwise" such indexes. Commercially published indexes would suffice, the committee stated.

In a letter published in the report, a Justice Department spokesman objected to the requirement as "unduly expensive and essentially unnecessary."

Identifiable Records

The 1966 act stated that an agency was required to release documents not listed in an index or elsewhere upon a request for "identifiable records." The bill changed that language to say: "Any request for records which reasonably describes such records," to ensure that agencies could not turn down requests just because the applicant didn't know the specific title or number of a document. The change would be "essentially a matter of semantics and thus unnecessary," the Justice Department countered.

Time Limits

The bill would give an agency 10 days to respond to a request for documents, and shorten the deadline for responding to appeals from 60 days to 20 days. "Excessive delay by the agency in its response is often tantamount to denial," the committee said. But the report added that "flexibility" should be allowed in special cases—if the documents were stored in a remote location, for example.

The Justice Department contended that a 20-day limit on answering appeals "would require that decisions be made without ample time for inquiry, consultation, and study, and consequently the incidence of positions that would later be reformulated would increase, causing unnecessary work for the parties on both sides and for the courts."

The committee's report also included a letter from a Defense Department spokesman maintaining that time limitations would be "our greatest single problem in implementing this bill." He argued that the deadlines might actually hamper public access to information because without adequate time to evaluate requests officials were more likely to deny them.

Attorneys Fees and Court Costs

The bill would permit, but not require, judges to authorize payment of attorneys fees and court costs for plaintiffs who won freedom of information suits against the government. The Justice Department protested that this would result in taxpayers paying costs for both sides—an expense that "could become quite substantial considering that well over 200 suits have been filed to date, and that number is ever increasing."

Court Review

Two amendments in the bill were "aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified by the Department of Defense and other agencies under executive order authority," the report said.

In a 5-3 decision announced Jan. 22, 1973 *(Environmental Protection Agency v. Mink)*, the Supreme Court held that courts could not review the contents of documents withheld from the public under the act's first exemption—"matters that are specifically required by executive order to be kept secret in the interest of the national defense or foreign policy." *(Decision, 1973 Weekly Report p. 143)*

In a concurring opinion to that decision, Justice Potter Stewart wrote that Congress had included in the act "an exemption that provides no means to question an executive decision to stamp a document 'secret' however cynical, myopic or even corrupt that decision might have been"—and he challenged Congress to change the law if it didn't like the exemption.

The proposed amendments to HR 12471 would do that by specifically authorizing courts to examine the contents of contested documents *in camera*—privately—to determine whether they should be withheld under the exemptions defined in the act. The bill also would modify slightly the wording of the "national defense and foreign policy" exemption to ensure that, in the report's words, a court "may look at the reasonableness or propriety of the determination to classify the records under the terms of the executive order."

The Justice and Defense Departments objected to the proposed changes on the grounds that courts were not qualified to review executive decisions on the classification of documents. "No system of security classification can work satisfactorily if judges are going to substitute their interpretations of what should be given a security classification for those of the government officials responsible for the program requiring classification," the Pentagon spokesman wrote. (The bill did not address itself to the validity of the security classifications themselves, but the subcommittee was planning to hold hearings in June on legislation to replace the executive order authorizing classification by a statutory system and establish a commission to oversee it.)

Congressional Oversight

The bill would require agencies for the first time to report to Congress each year on their compliance with the act, including details on executive branch refusals to release materials, appeals and rules and fees for obtaining documents. This provision was amended on the floor to require that the report go to the House speaker and Senate president instead of to relevant House and Senate committees. The Justice Department said it approved of congressional oversight, but did not think the reports were necessary to accomplish this.

'Agency' Definition

The bill would expand the definition of federal agencies covered by the act to include government-owned or controlled corporations such as the U.S. Postal Service, and bodies within the Executive Office of the President such as the Office of Management and Budget (OMB) and Office of Telecommunications Policy. Extending the act to such executive offices would be a "direct attack on the separation of powers system" and, "therefore, unconstitutional," the Justice Department contended.

Floor Action

In debate March 14 before passing the bill by a lopsided margin of 383-8, some House members expressed concern over the provision for court review of national security classifications.

C. W. Bill Young (R Fla.), one of the eight who voted against the bill, said he favored the general intent of the bill but would have to vote "nay" because the review proposal was "a specific grant of authority to the courts to second guess security classifications made pursuant to an executive order and thus constitutes a clear threat to our national defense."

But John N. Erlenborn (R Ill.), ranking minority member of the subcommittee that drafted the bill, said his panel's hearings had uncovered evidence that the power to classify documents was being badly abused. He argued that the possibility of court review would curb that abuse and create "a strong presumption in favor of declassification."

Amendment Considered

Only one amendment was offered on the floor. A proposal by Richard C. White (D Texas) to require that the agencies' annual reports on implementation of the act be submitted to the speaker of the House and secretary of the Senate instead of to certain congressional committees designated in the bill was adopted by voice vote.

Outlook

"By passing HR 12471 with an overwhelming vote we may begin to repair the grave erosion of public confidence in our governmental institutions that has resulted from recent Watergate scandals, secrecy and coverup," declared Jim Wright (D Texas) during the debate.

Such sentiments were likely to ensure Senate passage of a companion bill (S 2543) that was reported Feb. 26 by the Judiciary Subcommittee on Administrative Practice and Procedure. A subcommittee staff member told Congressional Quarterly that the full committee would probably take up the bill by early April, and predicted Senate passage before summer. As reported by the subcommittee, S 2543 contained the same court review provisions as HR 12471 as well as several additional proposals for strengthening procedures for obtaining government documents.

Related Development

The Supreme Court March 18 refused to consider—and thus let stand—two freedom of information decisions handed down by the District of Columbia Court of Appeals. Judge Malcolm R. Wilkey ordered federal agencies to analyze extensive documents to determine if parts could be released even if other parts of the same document could not, and to come up with explanations for refusing to make such selective disclosures. "Courts will simply no longer accept conclusory and generalized allegations of exemptions," the judge said. The court's action meant the suits in question would be remanded to the appeals court under the guidelines for disclosure defined by Wilkey. ✓

Casey Confirmation

In routine fashion and without objection, the Senate March 5 approved the nomination of Under Secretary of State William J. Casey as president of the Export-Import Bank.

The Senate Banking, Housing and Urban Affairs Committee by voice vote on March 5 had recommended Casey's confirmation. On Dec. 13, 1973, it had postponed action on the nomination "in order that it may receive additional information."

At the time, the committee's postponement was interpreted by some as a threat to Casey's chances for confirmation. Casey, the under secretary of state for economic affairs since January 1973, during the year was embroiled in controversy over his 1972 role, as chairman of the Securities and Exchange Commission (SEC), in handling SEC files sought by a congressional subcommittee investigating the settlement of an antitrust case against ITT. *(Casey role in Vesco case, p. 725)*